

**BOROUGH OF DUMONT
BERGEN COUNTY, N.J.
ETHICS BOARD
MINUTES - FEBRUARY 7, 2013**

Flag Salute

SUNSHINE LAW: The notice requirements of the Open Public Meetings Act of the State of New Jersey have been satisfied by the inclusion of the date, time, and place of this public meeting of the Ethics Board. Notice of this meeting is posted at Borough Hall, was sent to **The Record** and the **Ridgewood News**, posted on the Borough website and filed with the Borough of Dumont.

ROLL CALL: Thomas Ciotti, Jena Edone, Adriann Green, Ted Pomeroy-present; John McKenna, Thomas Reagan-absent.

Also present at the meeting was Council Liaison Matthew Hayes, Ethan Sheffet, Esq. and Kathy Schaefer, Board Secretary.

Motion to open the meeting to the public: Ms. Green

Second: Ms. Edone

All in favor: Aye

There being no members of the public at the meeting, motion to close the meeting to the public:
Mr. Ciotti

Second: Mr. Pomeroy

All in favor: Aye

Copies of the minutes of the January 17, 2013 Ethics Board meeting were sent to the board members prior to the meeting.

Motion to approve the minutes of the January 17, 2013 Ethics Board meeting: Ms. Green

Second: Ms. Edone

All in favor: Aye

Approval of Resolution 13-01 Authorizing a Closed Session of the Ethics Board, if necessary. The board secretary advised that Mr. Sheffet was contacted by the Borough Attorney regarding Mr. Sheffet's hourly billing rate. Mr. Sheffet agreed to accept the prevailing rate. Resolution 13-01 was pulled from the agenda.

Copies of Resolution 13-02 Authorizing Agreement for Professional Services for Ethics Board Attorney were sent to the board members prior to the meeting.

Motion to approve Ethan Sheffet, Esq. of Sheffet & Dvorin as the Board Attorney for the year 2013: Mr. Ciotti

Second: Mr. Pomeroy

All in favor: Aye

Ms. Green advised that there were two issues still open from last year. She stated that Mr. Sheffet would have to contact the prior board attorney and find out what Ms. Rizzuto had done, if anything, regarding these issues. Mr. Sheffet stated that he would contact Ms. Rizzuto to find out one way or the other where she is at with these things. If she has done something, it's done, there shouldn't be any need for him to do anything. If on the other hand, she hasn't, he will have to rely on her to fill him in on what has happened to the extent that her file does not reflect that. He will try to get it from her file if it is in there and he should be fine. Mr. Pomeroy asked if Mr. Sheffet expected her to charge for some preparation of the file to be submitted to Mr. Sheffet. Mr. Sheffet stated no, there should just be some copying costs involved.

Mr. Sheffet stated that he is at a disadvantage at terms of knowing where the board is at and what you have done without her file and notes. He stated that he does not have a copy of the actual complaint and does not have the closed session minutes. The board secretary stated that she would send those items to Mr. Sheffet the following day.

Mr. Sheffet stated that he was not sure of what the board wanted Ms. Rizzuto to do. The board secretary passed out copies of the September 20, 2012 minutes and pointed out page four of the minutes to Mr. Sheffet. Ms. Green advised that there was a conflict of when you become an elected official before taking the oath, so the Board wanted to change that definition. Mr. Ciotti stated that Ms. Rizzuto stated that you send this to the state and then the state decides if we can do that. Mr. Sheffet stated that he has his doubts about whether the state will permit this. The board secretary stated that Ms. Rizzuto also had her doubts. Mr. Ciotti stated that if the state does not permit it, then that adds clarification too because that would mean someone who is elected before they are sworn in is not really covered under the Ethics Code. Mr. Sheffet stated that this is not really a novel issue and there have been actually public officials who have been convicted on, for example, corruption charges where on appeal they were overturned for precisely this reason. But again, he has to look at the complaint, review it and see what it says. Mr. Sheffet asked if anyone wanted to tell him what the exact complaint of conduct was.

Mr. Pomeroy stated that he thought we could summarize it. Mr. Sheffet asked what the complaint alleged. Mr. Ciotti stated that the complaint alleged that elected officials who were not sworn in yet were meeting to discuss appointees for the borough and some of the people in the meeting were former officials who left under legally questionable circumstances. Ms. Green advised that it was also because of a lawsuit. Mr. Sheffet asked so what was the specific conduct that was alleged that was improper? Mr. Ciotti advised that the specific conduct alleged was that there was a conversation between a sitting councilman and one of the elected officials who was not sitting-newly elected, not sworn in, and that the lawsuit essentially named that sitting councilman and supposedly in a conversation, the person said that if our appointees go through, you don't have to worry about the lawsuit or something to that effect. Mr. Sheffet stated that he read in the newspapers what you are talking about, so that alleged speech was what is being criticized. Mr. Ciotti stated that the alleged speech which was allegedly a recorded conversation and it was a transcript but the transcript was not notarized and the original recording was no longer in existence. Mr. Ciotti stated that from our perspective it was just the fact that the official was elected but not sworn in yet. Mr. Sheffet stated that this is very problematic because part of where your obligations come from is the oath you take. Until somebody actually takes

that oath, and hears it and says it - number one, they have some understanding of what their obligations are based on their common sense but may not fully understand it. It's a little different when you hear what it is and all the different areas that you are supposed to protect. Mr. Ciotti stated that the meat of the complaint was that although the meetings occurred before the oath, the oath was taken and then the result of that meeting was presented. He feels that was the fine line of the complaint.

Mr. Sheffet stated that he was just addressing what it says here on page four which is that you want to have the Code of Ethics apply to somebody who has been elected but hasn't been sworn in. Mr. Ciotti stated that if that is something that has been gone through already and has been vetted, we can probably move on. Mr. Sheffet stated that he thinks it is problematic. Ms. Green stated that it is sad that you need to say that you should be ethical-if you want to be in office you should be ethical to begin with. Mr. Sheffet stated that there is a legal distinction of whether or not you are actually in office because you can't act in your capacity as an elected official until you have actually taken your office and you actually don't have the same duties and obligations just because you haven't taken your oath - it is what it is - you can't act as a public official until you are a public official. Mr. Ciotti stated that if you are saying there is precedent for this whole thing, if the former attorney had advised us of that, I don't know that we would have said yes, let's try to change things. Mr. Sheffet stated that there is precedent in that this is a recognized legal important distinction that someone who is not an elected official because they haven't been sworn in, can't act as an elected official, just factually, and therefore, they can't be found to have violated any rule, regulation or obligation that would apply to an elected official because they are not yet and there's legal precedent for that, so much so that there's been convictions overturned and things like that. To say that you want your Code of Ethics to apply to people who have been elected but who are not public officials is problematic because you want somebody to have obligations before they have the obligations legally. The board secretary stated that our past attorney had alluded to that fact because when we were talking about this, she would give cases, and Mr. Pomeroy had also mentioned a case. Mr. Sheffet stated that he is looking at a very narrow issue - can you have your Code of Ethics apply to people who are elected but haven't assumed the office and he thinks this is very problematic just because when you look at the Code of Ethics, and people have a lot of trouble understanding this, because people say why doesn't it apply to the attorney of the board, the secretary of the board, this is the governing body he is talking about, why doesn't it apply to these public employees and the answer is that these ethics laws we are talking about really apply to elected officials because they get to control policy, they get to vote, they get to influence other votes and they actually have a vote and the other public employees do not. The only way to have a vote is that you are actually in the seat so to say to somebody that they are going to have obligations that arise from the fact that they can vote when they can't, I don't really think that you can.

Mr. Ciotti asked if Mr. Sheffet could review the actual resolution that the Council initially presented to create this board because there is some language in there that is not strictly elected officials, it makes it sound like appointed officials. That was the point of some of the confusion as well. Mr. Sheffet stated that he wasn't suggesting that public employees do not also have ethical obligations. Mr. Ciotti said that if we do not have any oversight over public employees; Mr. Sheffet stated that you do, he was trying to make his explanation simple where if you look at the "not Dumont's rules", so to speak but if you look at the New Jersey State Ethics Law and you

look at conflicts and things like that and when it starts really applying, it's the part of those rules that discuss the ability to vote and influence policy which comes with the seat and that's really the point he was trying to make.

Mr. Pomeroy stated that he would like to make a motion that any what could be perceived as open items from 2012 just be considered closed and let's move on.

Mr. Ciotti stated that he would agree with Mr. Pomeroy on this particular piece that we just discussed, but remember that there were two pieces to this, the one piece I would agree if it is not going to go anywhere with the state, it should be gone but the other piece I would like to discuss.

Mr. Pomeroy agreed to that. It was agreed that no letter would be sent to Trenton.

Roll call vote: Mr. Ciotti, Ms. Edone, Mr. Pomeroy, Ms. Green: Aye

Mr. Sheffet asked what the second piece was. Mr. Ciotti stated that the second piece was that the sitting councilman who was in on these conversations, he was sitting and he was in meetings that this was being discussed and what we had talked about is instead of compiling information to try to use against a political opponent, he probably should have come forward either to the Ethics Board or to someone else to say there is something going on that I don't think is savory, I am a sitting councilman and I am not comfortable being part of this, but he didn't.

Mr. Sheffet stated then again, he is at a real disadvantage here because he wasn't here when you had all these discussions but I do have an understanding just based on applying for this position I did a little homework. He said it was his understanding and what was confirmed here tonight that the complaint that came before this board was based on a statement that one particular person made to the party that was filing the complaint which had to do with "the lawsuit will go away". Mr. Ciotti stated no, the party that the comment was made to was the sitting councilman. The sitting councilman did not bring the complaint-what the sitting councilman did is he took all his information and gave it to the opposition political party. To Mr. Ciotti and in our board's discussions, that was a little problematic because this was a sitting councilman and if I am sitting and I feel that something is not ethical, you would think that he may have said something about that instead of waiting two months. What we had talked about was there a way to making that a little clearer with the Council of how to handle situations that might come up that might be questionable enough for you to actually record someone's conversation but never think to bring it to the Ethics Board or to someone else to say something is not right here.

Mr. Sheffet stated that he did not know what discussions we had about that, but if he were the attorney that you were to pose that issue to, he would say that the problem and the thing that you need to consider is it is very difficult many times to determine whether this information, he will refer to it as, is something that violates some rule of ethics and to basically put in some sort of reporting requirement that predisposes that the person who has the reporting obligation is going to be able to make a determination of whether what is being said or done should be reported and that's often times extremely difficult. Frankly, many, many questions are posed before the Local Finance Board all the time because people don't know. You could put a reporting requirement in which is essentially what you want but the difficulty is, from a practical aspect, it is very difficult to kind of determine when that reporting requirement can actually come in to play. When you talk about all these ethical rules you want to have in government, there are just so many gray areas so that if you then put a reporting requirement in, you could have somebody who is being

brought up on an ethics charge or someone who violated a rule per se where they really had no idea they were doing it. Under the law you have two types of conduct, you have acts and then you have omissions. What you are now kind of doing to do is say an omission is now going to be prohibited conduct which the law does permit omissions in a lot of different instances and doesn't require action to be taken by somebody. Those are the things to consider. The first thing you have to consider is that if you want to impose a reporting requirement but in practice it might be very difficult to deal with because there are so many different shades of gray when it comes to a lot of these situations on whether the conduct is considered unethical or not that a person truly might not realize that what one person finds offensive or would think of it as unethical they would truly believe that there was absolutely nothing wrong with it. He just feels that for enforcement and application purposes, it would be difficult. Then also you have to think are you going to take an omission now and create an obligation to do something.

Mr. Ciotti stated the only thing he would say is that he is fine with Mr. Sheffet reading through everything and going with what his recommendation would be. Mr. Ciotti stated this was not exactly an omission like I didn't do something, this was I didn't do this but instead like this was something like I saw somebody cheating in school, but I didn't report it, instead I took a picture of it and post it on Facebook. Mr. Sheffet stated that he thinks that what your point is that you have gone now from creating a firmer obligation to report and he thinks what he, Mr. Ciotti is saying, is that it is not that the person didn't report it, it's that they did engage in conduct, not that there was an omission but they engaged in conduct and it's that conduct that you find to be unethical. Mr. Ciotti stated that he thinks it is both, that it is the joining of the two, that I saw something he thought was unethical both I chose not to let anyone know that it was unethical, so there is the omission, and instead I chose to collect all this information and then do something which was politically based to hurt someone else, that's where it is a little bit different. Mr. Sheffet stated that you said there was an omission and that there was also conduct and it wasn't the right way to handle it. Mr. Ciotti stated that if you don't realize something is unethical, he understands how that would be an omission, that's one thing but if you think something is unethical enough to record a conversation, it was the sitting councilman who recorded it, they collected the information and then they gave it to the opposing political party's chairperson. Mr. Pomeroy stated that the person in question here is no longer in office. Mr. Ciotti stated that he knows that but what happens if it happens again. Mr. Pomeroy stated that you never know what's going to happen again.

Councilman Hayes asked what do you think happened here. Mr. Sheffet stated that from what he had read on the internet and looking at newspapers, he thinks that what people felt was that the unethical conduct was a council person being offered some sort of personal gain in exchange for acting within the capacity of an elected official, meaning making a vote, making appointments and the personal gain was a dismissal of some lawsuit that would impact reputation or have some financial impact having to deal with having to defending against it. Mr. Sheffet stated he thinks that the allegation was that the conduct was unethical because it was hey if you do that, we will do this for you, there will be personal gain. I think that is what is at the heart of the matter. Mr. Sheffet stated that if a councilperson did something under code of office for personal gain that is considered an ethics violation. He is not saying that is what happened, if you were to look at how could something like that be unethical, that would be the answer. Mr. Ciotti asked that Mr.

Sheffet read through the case and he is fine with whatever Mr. Sheffet's recommendation is. Mr. Sheffet stated there is a difference between politically expedient and advantageous and unethical.


Mr. Sheffet stated that before we adjourn, he would like to make one suggestion that the Board should think about. He doesn't know how this Ethics Board is perceived in Dumont in terms of what its purpose is and it is probably that this is where you go if you have a formal complaint. He saw that in some of the minutes you were discussing advisory opinions and things like that. He would encourage the Board to think about what kind of role you want to play because in his experience, every day, employees within government have all kinds of questions about what they can do and what they can't do, there are lots of scenarios that come up where they question what is the right ethical thing to do. He doesn't know if they had a question whether they would come to this Board for an answer or whether they think this Board is just where you would come with a formal complaint, that the Board reviews it and takes action. Think about it and if you want to play a role like that, think about maybe communicating that to the governing body to see how they feel about that and then discussing it with the employees.

Motion to adjourn: Mr. Pomeroy

Second: Ms. Green

All in favor: Aye

Minutes respectfully submitted by:

 5/16/13
Kathy Schaefer
Ethics Board Secretary